

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

MICHAEL IRVING MINER,

Defendant-Appellant.

UNPUBLISHED

July 20, 2001

No. 220262

Oakland Circuit Court

LC No. 98-163522 FH

Before: White, P.J., and Sawyer and Saad, JJ.

PER CURIAM.

The jury convicted defendant of third-degree criminal sexual conduct, MCL 750.520d(1)(a). The court sentenced defendant as a fourth habitual-offender, MCL 769.12, to a term of seven to fifteen years' imprisonment. He appeals as of right, and we affirm.

Defendant argues that the evidence was insufficient to support his conviction of third-degree CSC. We disagree. We review a sufficiency of the evidence claim by viewing the evidence in the light most favorable to the prosecution to determine whether a rational trier of fact could find that the essential elements of the crime were proven beyond a reasonable doubt. *People v Johnson*, 460 Mich 720, 723; 597 NW2d 73 (1999). Questions of credibility and intent are for the trier of fact to resolve. *People v Avant*, 235 Mich App 499, 506; 597 NW2d 864 (1999).

Defendant was convicted of violating MCL 750.520d(1)(a), which provides:

(1) A person is guilty of criminal sexual conduct in the third degree if the person engages in sexual penetration with another person and if any of the following circumstances exist:

(a) That other person is at least 13 years of age and under 16 years of age.

"Sexual penetration" is defined as "any . . . intrusion, however slight, of any part of a person's body or of any object into the genital or anal openings of another person's body." MCL 750.520a(1).

Here, the complainant testified that she was fourteen years old at the time of the charged incident. She testified that defendant inserted his finger inside her vagina while the two were in defendant's motel room. Viewed most favorably to the prosecution, this testimony was sufficient to enable the jury to find beyond a reasonable doubt that defendant was guilty of third-degree CSC. Although defendant characterizes the complainant's testimony as uncorroborated, self-serving and conflicting, the credibility of the complainant's testimony was for the trier of fact to resolve. *Avant, supra*.

Also, the trial court did not abuse its discretion in admitting evidence that the complainant and other persons present in the motel room smoked marijuana shortly before the charged assault. The evidence was admissible to allow an "intelligible presentation of the full context in which disputed events took place." *People v Sholl*, 453 Mich 730, 741-742; 556 NW2d 851 (1996).

Further, defendant contends that the trial court improperly prevented him from cross-examining the complainant regarding her history of treatment for depression and the fact that she had been expelled from school for providing a caffeine pill to another student. We disagree. A trial court properly may preclude examination on collateral matters bearing only on general credibility without violating the defendant's constitutional rights of confrontation. MRE 608; *People v Hackett*, 421 Mich 338, 348-349; 365 NW2d 120 (1984); *People v Jackson*, 108 Mich App 346, 348-349; 310 NW2d 238 (1981). Here, the matters in question were not relevant to the issues at trial and, at best, were only marginally probative of the complainant's general credibility. The trial court did not abuse its discretion in precluding examination regarding these matters.

Defendant further alleges that defense counsel was constitutionally ineffective for failing to request a jury instruction on lesser included offenses. Limiting our review to the record, *People v Oswald (After Remand)*, 188 Mich App 1, 13; 469 NW2d 306 (1991), defendant has failed to overcome the presumption that counsel's decision not to request lesser offense instructions was sound trial strategy. *People v Armstrong*, 124 Mich App 766, 769; 335 NW2d 687 (1983); *People v Rone (On Second Remand)* 109 Mich App 702, 718; 311 NW2d 835 (1981).

Defendant also says that he was denied a fair trial because of numerous improper comments by the prosecutor during closing argument. Because defendant did not object to the challenged remarks at trial, this issue is not preserved. Accordingly, we review this issue for plain error affecting defendant's substantial rights. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999).

The prosecutor's remarks concerning defendant's theory of defense are not plainly improper. On the contrary, viewed in context, they constitute proper commentary on the evidence and inferences drawn therefrom. *People v Schutte*, 240 Mich App 713, 720; 613 NW2d 370 (2000). Also, it was not improper for the prosecutor to argue from the evidence why the complainant was worthy of belief. *People v Howard*, 226 Mich App 528, 548; 575 NW2d 16 (1997). The prosecutor did not vouch for the credibility of the witness by suggesting that she had some special knowledge that the witness was testifying truthfully. *People v Bahoda*, 448 Mich 261, 276; 531 NW2d 659 (1995).

We agree, however, that the following remarks were plainly improper:

Doesn't it strike you, too, as odd, that he's friends with all of these young ladies? It should make your skin crawl and what makes – should make your skin crawl, if it hasn't already, what the heck is a grown man doing massaging a teenager's legs in the first place?

* * *

This is also the same man that not only smokes marijuana, but smokes it in front of his children. He wants you to believe that this is all fun and innocent and it's not harming anyone. He's a cover-up and everything he does, he covers up or tries to justify and he uses his children to do so. This man is a coward just like he's a coward and is not going to admit to you that he did this to her.

It was improper to suggest that defendant's use of marijuana tended to show that he was a person who would perform illegal acts. Such argument exceeded the permissible scope for which the evidence of marijuana was permitted in this case. *Sholl, supra* at 741; MRE 404(b). Additionally, a prosecutor should not "resort to civic duty arguments that appeal to the fears and prejudices of jury members or express their personal opinion of a defendant's guilt, and must refrain from denigrating a defendant with intemperate and prejudicial remarks." *Bahoda, supra* at 282-283.

Nevertheless, we conclude that the improper remarks did not affect defendant's substantial rights. The remarks were not so egregious that a curative instruction, upon timely objection, could not have eliminated any possible prejudice stemming from the remarks. See *People v Duncan*, 402 Mich 1, 15-17; 260 NW2d 58 (1977); *People v Rivera*, 216 Mich App 648, 651-652; 550 NW2d 593 (1996). Additionally, we note that any prejudice was ameliorated by the trial court's instructions that the jury should decide the case based only on the evidence and that the attorneys' arguments were not evidence. Accordingly, reversal is not warranted on the basis of this unpreserved error.

Affirmed.

/s/ Helene N. White
/s/ David H. Sawyer
/s/ Henry William Saad